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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

OKUN BROTHERS SHOE STORE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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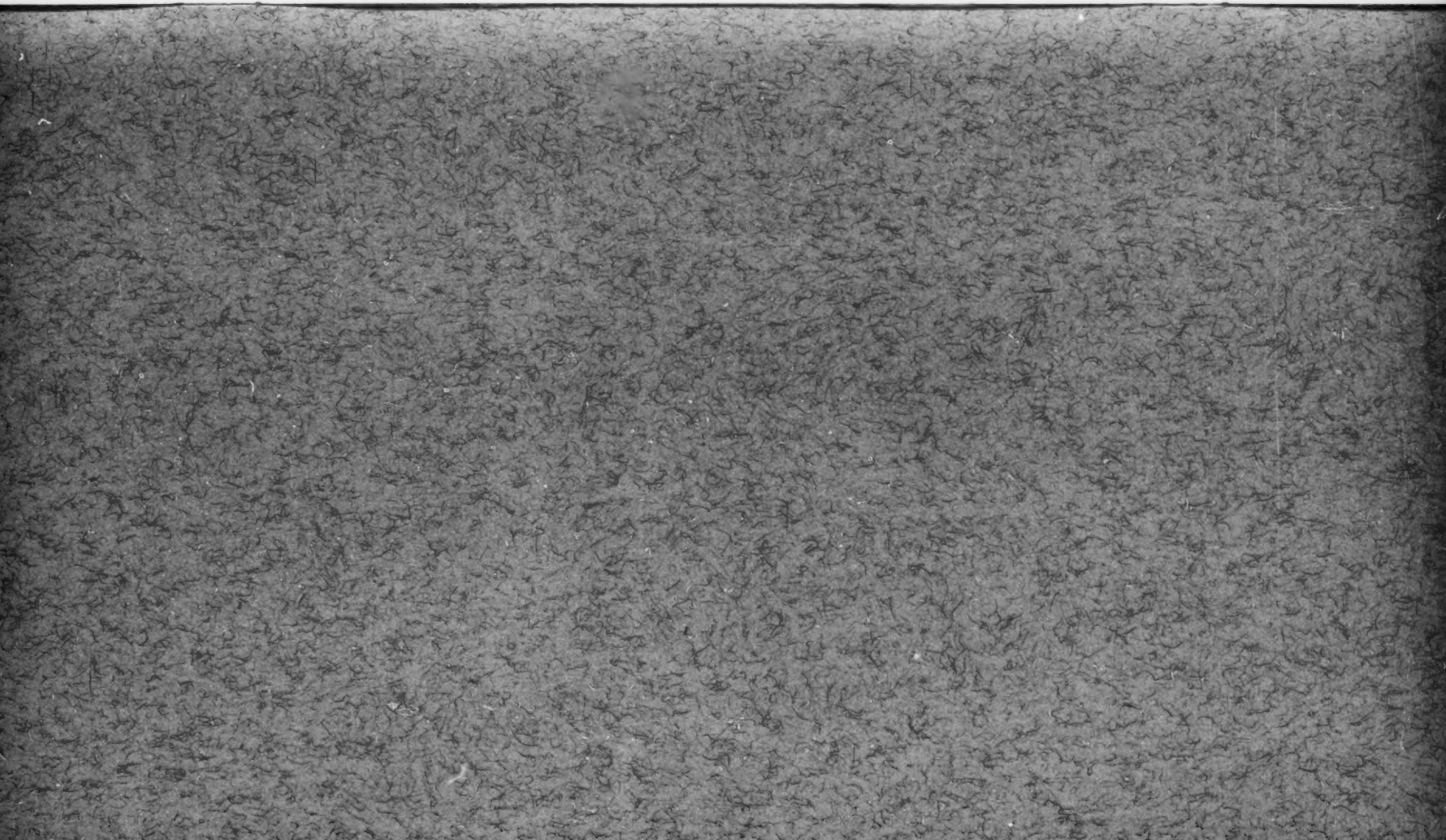

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Petitioner contends that the court of appeals erred in upholding the National Labor Relations Board's determination that petitioner violated Section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1), by threatening employees with a reduction in overtime in the event the union succeeded in organizing petitioner's employees.

1. In the winter and early spring of 1981, Local 36, United Food and Commercial Workers International Union, AFL-CIO (the Union), engaged in a campaign to organize the employees of petitioner, a family-owned retail shoe store. Pet. App. 8; 275 N.L.R.B. 1019, 1021 (decision of the administrative law judge). On or about April 25, 1981, Cris Nezamus, the assistant store manager, walked up to two of petitioner's sales employees, Smirle Weston and Tony O'Brien, who were drinking coffee in

the area of the store set aside for employee coffee breaks. It is unclear whether Nezamus was talking to himself or addressing the two employees, but he was overheard by the employees to say that, if the union were voted in, employees who joined the union would have their working hours cut from 56 to 40 hours per week (resulting in a substantial decrease in earnings), and that he probably would let store manager Steele handle the reduction in hours. 275 N.L.R.B. at 1021; Pet. App. 8, 14.

The Union lost the ensuing representation election by a 19-19 tie vote. It filed both objections to the election and unfair labor practice charges, asserting, among other things, that petitioner, through supervisor Nezamus, had engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by threatening employees with a reduction in hours if they chose union representation. Pet. App. 8, 14; 275 N.L.R.B. at 1021.

2. The administrative law judge (ALJ) found that petitioner had engaged in an unfair labor practice by threatening its employees (275 N.L.R.B. at 1021-1024). The ALJ rejected petitioner's contention that Nezamus's statement did not constitute a threat because the employees who heard the statement did not have any respect for Nezamus and the statement therefore did not actually coerce those employees. He stated that "the test with respect to whether the statement constituted an unfair labor practice is not whether it actually coerced the employees to which it was made but whether the statement would tend to be coercive to the employees generally" (*id.* at 1021). The ALJ found that, notwithstanding Weston's and O'Brien's apparent lack of respect for Nezamus, "a statement from a supervisor during a union campaign that if a union was to be voted in, the employees' working hours (and correspondingly their pay) would be cut would tend to be coercive"

(*id.* at 1021-1022). He found that the statement therefore constituted an unfair labor practice in violation of Section 8(a)(1).[1]

The Board upheld the ALJ's determination by a divided vote (Pet. App. 8-12). It stated that "Nezamus was an admitted supervisor; he intimated that higher management was involved by saying he would let Store Manager Steele handle [the reduction in overtime]; and his remarks threatened a substantial (over 25 percent) reduction in hours" (Pet. App. 8).[2]

3. The court of appeals, by a divided vote, upheld the Board's determination that petitioner had violated Section 8(a)(1) by threatening its employees with a reduction in hours (Pet. App. 13-26). The court stated that "the test for determining whether an employer has violated Section

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[1] The ALJ also found that petitioner had violated Section 8(a)(1) by interrogating an employee, and by soliciting grievances and promising benefits during the election campaign. He recommended that petitioner be ordered to cease and desist from engaging in such conduct and that petitioner be directed to post a notice informing its employees of their rights under the Act. 275 N.L.R.B. at 1022-1023. The ALJ further found that the conduct that constituted unfair labor practices required that the results of the election be set aside. He accordingly recommended in favor of that relief as well. *Id.* at 1023-1024.

[2] The Board upheld the ALJ's findings with respect to the other unfair labor practice charges (Pet. App. 9). The Board adopted both the injunctive relief recommended by the ALJ and the ALJ's recommendation in favor of a new election.

Chairman Dotson dissented. With respect to the Board's finding based upon Nezamus's statement, he stated that "[i]n light of Nezamus' manner of approach, his use of hedging and disclamatory words, and his low status and esteem, Weston and O'Brien had reasons to believe that Nezamus was merely expressing his own anxieties rather than speaking for management. In these circumstances, I would find that Nezamus did not threaten Weston and O'Brien" (Pet. App. 10). Chairman Dotson also disagreed with the other findings of unfair labor practices (*id.* at 10-12).

8(a)(1) is whether the employer's conduct tends to be coercive or tends to interfere with the employee's exercise of their rights" (Pet. App. 16). Applying that standard, the court found that substantial evidence supported the Board's finding that Nezamus's statements to Weston and O'Brien violated Section 8(a)(1).

The court stated that "Weston testified that he understood the statements to be threats, and O'Brien testified that he was never sure when Nezamus acted on his own or when he represented management even though he did not generally listen to Nezamus 'unless it suited him' " (Pet. App. 16). The court rejected petitioner's argument that the employees could not have been threatened by Nezamus's statement because Nezamus had no real managerial authority. The court observed that petitioner had conceded that Nezamus was "a manager at the store" and that "there can be little doubt that [petitioner's employees] did identify him with store management" (*id.* at 17). The court added (*id.* at 18):

> More persuasive to us and we believe to the Board, however, was the fact that as weak as Nezamus himself might have been, his comments had particular credibility when, perhaps acknowledging his own ineffectiveness, he indicated that he would allow Charlie Steele, the store manager, to handle any changes in overtime rather than implementing those changes himself. Thus while the employees might not have believed that Nezamus personally could or would effect the cut in hours, they surely could have believed as an assistant store manager, he would be privy to management plans. An employee pondering how to vote in the election could easily have concluded from Nezamus' statements that such action

was under serious consideration by management should the union be voted in.

Judge Krupansky dissented. He agreed with the majority that "a statement of a supervisor relating to unionization will be deemed coercive if, when viewed in all the surrounding circumstances, its probable effect tends to interfere with the employees' free exercise of their rights to self-organization" (Pet. App. 26). He stated that "[c]onsidering the low esteem in which Nezamus was held by [petitioner's] employees and their knowledge that he didn't speak for management, coupled with the innocuous import of his comments, Nezamus' statement about the possibility of a reduction in hours had no coercive tendencies" (*ibid.*).[3]

4. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is not warranted.

a. Petitioner first contends (Pet. 4-5) that the Board and the court of appeals applied the wrong legal standard in finding a violation of Section 8(a)(1). It asserts that such a violation must be based upon a showing that the employer's conduct actually coerced an employee in the exercise of rights protected by the National Labor Relations Act, rather than a showing that the employer's con-

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[3] The court of appeals found that the Board's other findings of unfair labor practices were not supported by substantial evidence and denied enforcement as to those findings (Pet. App. 20-24). No issue regarding those findings is presented here.

The court of appeals upheld the Board's order directing petitioner to hold a new election (Pet. App. 13), although this portion of the case was not properly before the court. An election order is not a "final order" within the meaning of Section 10(e) of the Act, 29 U.S.C. 160(e). *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 409 (1940); *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137, 139 (1971).

duct had a "tendency" to coerce the employee. Petitioner's legal argument is clearly wrong.

This Court has long held that the Board need not "probe the precise factors of motivation" in determining whether an employee has been coerced by employer conduct; the Board instead must assess "the circumstances which the employer created or for which he was fairly responsible and as a result of which *it may reasonably be inferred* that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." *NLRB* v. *Link-Belt Co.*, 311 U.S. 584, 588 (1941) (emphasis added); see also *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The approach of the Board and the court below is consistent with that standard.

Moreover, as petitioner acknowledges (Pet. 5), the courts of appeals have consistently found a violation of Section 8(a)(1) on the basis of threats that "tend to coerce" an employee in the free exercise of his Section 7 (29 U.S.C. 157) rights. The courts have not required proof that the employer's conduct in fact affected the employee's choice. See, *e.g.*, *Mead Corp.* v. *NLRB*, 697 F.2d 1013, 1025 (11th Cir. 1983); *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 660 F.2d 1335, 1341 (9th Cir. 1981), vacated and remanded on other grounds, 461 U.S. 731 (1983); *TRW-United Greenfield Div.* v. *NLRB*, 637 F.2d 410, 415 (5th Cir. 1981); *NLRB* v. *Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946); *NLRB* v. *John Engelhorn & Sons*, 134 F.2d 553, 556-557 (3d Cir. 1943). There is accordingly no reason for this Court to address the issue.[4]

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[4] Indeed, neither the dissenting member of the Board nor the dissenting judge on the court of appeals argued that those tribunals applied an erroneous legal standard in assessing the unfair labor practice claim. The dissenters simply disagreed with the application of the standard to the facts of this particular case. See Pet. App. 10, 26.

b. Petitioner also contends (Pet. 5-7) that the Board and the court of appeals erred in applying the governing legal standard to the facts of this case because Nezamus's statement "could not possibly have had any impact on [Weston and O'Brien]." That claim simply takes issue with the Board's finding, upheld by the court of appeals, that the statement that higher management would cut overtime hours if the Union were successful was reasonably perceived as a threat by the employees who heard it. The court's fact-bound determination that the Board's decision is supported by substantial evidence does not merit review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the evidence amply supports the Board's factual conclusion. Putting to one side petitioner's defense based upon Nezamus's alleged diminished status, the statement is plainly coercive. It directly ties a vote for the union to a reduction in employees' pay. And Nezamus's status did not wholly eliminate the statement's coercive tendency. Nezamus remained a part of management and had in the past exercised management responsibilities. In addition, Nezamus's reference to store manager Steele supported the inference that the planned reduction in hours had been cleared by top management. The court of appeals therefore correctly upheld the Board's conclusion that Nezamus's statement had a tendency to coerce petitioner's employees. See Pet. App. 16-20.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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